STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2009
v	No. 282692 Wayne Circuit Court
ADIB AWASHRA, Defendant-Appellant.	LC No. 07-012238-FH

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of attempted felonious assault, MCL 750.82; MCL 750.92. Defendant was sentenced to two years' probation with the first 90 days served in jail. We affirm.

On July 17, 2007, defendant's wife, Samira Hamid, while accompanied by her three minor children had a verbal confrontation with defendant. Samira drove away with the children and defendant followed her in a separate vehicle for several blocks. Samira saw a city of Detroit police car parked at a local restaurant and pulled into the parking lot. Defendant followed and collided with Samira's vehicle. The collision was witnessed by the Detroit police officers. After the collision, Samira ran toward the officers to seek assistance. The officers immediately called the city of Dearborn Police Department and Dearborn police officer Joshua Russell and his partner arrived on the scene within one and a half minutes of receiving the call.

Officer Russell testified at trial that Samira told him, at the scene, that she was fearful of defendant and drove toward the parked police vehicle in an attempt to evade defendant. Russell also related that Samira said that defendant swerved his vehicle to possibly run her off the road. Defendant first contends that the trial court erred in admitting this hearsay testimony under the excited utterance exception. "A trial court's evidentiary decisions are reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008) (citations omitted).

The excited utterance hearsay exception is defined in MRE 803(2) as, "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Defendant contends that Samira's statements to Russell were not admissible as an excited utterance because too much time had elapsed between the events and her communication to the officer. However, only two requirements exist for a statement to be admitted as an excited utterance: "1) that there be a startling event, and 2) that

the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Contrary to defendant's argument, "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551 (citation omitted). "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id.* at 552. Further, "there is no express time limit for excited utterances." *Id.* at 551-552.

In this instance, the trial court did not abuse its discretion in admitting the proffered testimony as Samira's statements to Russell had sufficient indicia of reliability due to their close temporal proximity to her experience of being followed and the subsequent vehicular collision that comprised the startling event she described. Additionally, police officers present at the scene described Samira as being very excited, upset and speaking rapidly, further demonstrating her statements occurred while "under the stress of excitement caused by the event."

Defendant also asserts that admission of this testimony violated his Constitutional right of confrontation. Although defense counsel objected to Officer Russell's testimony on the basis of hearsay, defendant did not properly preserve his claim that the officer's testimony violated his Sixth Amendment right of confrontation. By failing "to make the timely assertion of [his] right," defendant has forfeited such right, thus limiting appellate review of his constitutional claim to plain error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Relying on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant contends the proffered hearsay was testimonial in nature and, therefore, inadmissible. However, we need not address this contention because defendant ignores that the *Crawford* Court ruled that the Confrontation Clause is not violated where a hearsay declarant is available for cross-examination at trial. *Id.* at 59 n 9. Samira testified during defendant's trial and, therefore, was available for cross-examination. Consequently, the admission of her statements to Russell did not violate defendant's right of confrontation.

Defendant next argues that the evidence was insufficient to support his convictions. This Court reviews a challenge to the sufficiency of the evidence de novo, viewing the evidence in the light most favorable to the prosecution. The Court must determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Tombs*, 260 Mich App 201, 207; 679 NW2d 77 (2003).

The elements comprising an attempt to commit a felonious assault require (1) action be taken in furtherance of an assault, beyond mere preparation, and (2) an intent to cause another to fear an immediate battery, while armed with a dangerous weapon. *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (citation omitted); *People v Burton*, 252 Mich App 130, 141; 651 NW2d 143 (2002) (citations omitted). "The overt acts in the furtherance of an attempt must be clear, because 'so long as the equivocal quality remains no one can say with certainty what the intent of the defendant is.'" *Id.*

The court acquitted defendant of felonious assault but convicted him of attempted felonious assault, concluding that defendant collided with his wife's vehicle to prevent her from exiting the parking lot. Police officers testified that defendant rammed his car into the left side of his wife's vehicle and because there were no vehicles on either side of where defendant or his

wife were parking, defendant must have purposely struck her vehicle. Russell also testified that, while still visibly upset, Samira stated that defendant caused his vehicle to collide with hers in an attempt to block her path. As such, it is reasonable to infer that defendant's act of driving his car into Samira's vehicle caused his wife to fear an immediate battery. Therefore the evidence was sufficient to support defendant's convictions of attempted felonious assault.

For his final issue on appeal, defendant asserts that the trial court's verdict was against the great weight of the evidence. The standard of review for a great weight of the evidence challenge is "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001) (citation omitted).

Defendant testified that he and his wife were on good terms, and had not argued on the day of the incident. It was defendant's understanding that his wife had agreed to go home and talk. When she drove in another direction, defendant followed her. According to defendant, after having another conversation, he and his wife decided that defendant would park his vehicle and they would ride home together. According to defendant, Samira struck his car while he was in the process of parking. However, defendant's testimony contradicts the testimony of police officers at the scene and defendant's wife that defendant collided with Samira's vehicle.

"[C]redibility of the witnesses is implicit in determining great weight or overwhelming weight of the evidence." *People v Lemmon*, 456 Mich 625, 638; 576 NW2d 129 (1998). Issues regarding witness credibility and conflicting testimony are resolved by the trier of fact and comprise an insufficient basis for granting a new trial. *Id.* at 642-643. Further, a trial court's factual findings in a bench trial will not be reversed unless clearly erroneous. *People v United States Currency*, 164 Mich App 171, 179; 416 NW2d 700 (1987). Based on our review of the record, we do not find the trial court's ruling to be in error and will not displace the trier of fact's determination with regard to the credibility of the witnesses. *Lemmon*, *supra* at 646.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio